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Supreme Court, U.S.
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Case No. _____
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1994

JOHN E. BRITT,

Petitioner,

vs.

JERRY SMITH, JOSEPH WILSON, PAT BROWN, GENESEE COUNTY SHERIFF'S DEPARTMENT, GENESEE COUNTY

Respondents.

PETITION FOR WRIT OF CERTIORORI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORORI

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48 pp

QUESTIONS PRESENTED

1. Whether the State Court is bound to follow Federal precedent adopted by State Court decisions relative to substituted service and notice deemed sufficient for due process purposes.

2. Whether the State Court can give strict construction to its Court Rule(s) as a basis for denying a Federal Claim where Federal precedent dictates a different result.

3. Whether a 42 USC 1983 prison claimant detailed allegations of 8th Amendment violations based on both denial and inadequate medical care are sufficient to withstand summare disposition motions of dismissal.

4. Whether the trial court's denial of attorney withdrawal resulting in frustrating the plaintiff's Federal claims is remedial or subject to redress under the constitution.

LIST OF PARTIES AND RULE 28.1 LISTING

The parties to the proceedings before the Michigan Supremem Court were Genesee County, Genesee County Sheriff's Department and Genesee County Sheriff Joseph Wilson, Jerry Smith, and Pat Brown, prison guards.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES AND RULE 28.1 LISTING	II
OPINIONS/ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
I. INTRODUCTION	5
II. THE DENIAL BY THE MICHIGAN SUPREME COURT OF PETITIONER'S APPLICATION FOR LEAVE TO APPEAL AFFIRMS THE LOWER COURT'S DECISION THAT IGNORES THE STATE AUTHORITY RECOGNIZING FEDERAL PREDEDENT AS TO SUBSTITUTED SERVICE AND NOTICE REQUIREMENTS	7
A. THE DISMISSAL OF DEFENDANT JERRY SMITH FROM SUIT WAS CONTRARY TO DUE PROCESS AND NOTICE REQUIREMENTS ASSOCIATED WITH SUBSTITUTED SERVICE	7
III. DEFENMDANT JERRY SMITH'S ACTS OF ASSAULT AND BATTERY UPON PLAINTIFF SHOULD HAVE PRECLUDED DEFENDANT'S DISMISSAL FROM SUIT BASED ON FEDERAL PRECEDENT UNDER 42 USC SEC. 1983	13

IV. THE DEFENDANTS GENESEE COUNTY, GENESEE SHERIFF'S DEPARTMENT, GENESEE COUNTY SHERIFF JOSEPH WILSON AND DEPUTY PAT BROWN SHOULD NOT HAVE BEEN DISMISSED FROM PLAINTIFF'S 42 USC 1983 ACTION BY MEANS OF SUMMARY DISPOSITION MOTION UNDER THE EIGHTH AMENDMENT..... 15

V. THE TRIAL COURT ERRED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHERE HIS DENIAL OF PLAINTIFF'S RIGHT TO SEEK WITHDRAWAL OF COUNDEL FRUSTRATED PLAINTIFF'S RIGHT TO LITIGATE HIS FEDERAL CLAIM..... 22

APPENDIX A..... 1A

APPENDIX B..... 3A

APPENDIX C..... 6A

APPENDIX D..... 8A

APPENDIX E.....13A

TABLE OF AUTHORITIES

Federal

Archer v Duthcer, 733 F2d 1416 (2d Cir. 1984) 18

Bass v Jackson, 790 F2d 260 (2d Cir. 1986) 18

Brown v Coughlin, 758 F Supp 876 (SD NY 1991) 22

Crooks v Nix, 872 F2d 800 (8th Cir. 1989) . 16

Dilmore v Stubbs, 636 F2d 966 (5th Cir. 1981) 13

Dishaney v Winnebago County Department of Social Services, 489 US 189; 109 SCt 998; 103 LEd 2d 249 (1989) 19

Doe v New York City Department of Social Services, 649 F2d 134 (2nd Cir. 1981) 21

Estelle v Gamble, 429 US 97; 97 SCt 285; 50 LEd 2d 251 (1976) 15,19,20

Gill v Mooney, reaff'd, 709 F2d 782 (1982) cert den 464 US 864 (1983) 18

Hahn v McLey, 737 F2d 771 (8th Cir. 1984) . 16

Hathaway v McCoughlin, 841 F2d 48 (2d Cir. 1988) 18

Liscio v Warren, 901 F2d 274 (2d Cir. 1990) 18

Messimer v Lockhart, 702 F2d 729, 732 (8th Cir. 1983) 16

Monell v Department of Social Services, 436 US 458; 98 Sct 2018; 56 LEd 2d 611 (1978) 20

Mullane v Central Hanover Bank and Trust, 339 US 306; 70 Sct 652; 94 LEd 865 (1950) 8,9,12

Slakon v Porter, 737 F2d 368 (4th Cir. 1984), cert den 470 US 1035 (1985)..... 16

Williams v Smith, 781 F2d 319 (2d Cir. 1986)..... 17

Williams v Thomas, 511 F Supp 535 (1981)... 14

Williams v Vincent, 508 F2d 541 (2nd Cir. 1974)..... 17

State

Krueger v Williams, 410 Mich 144; 300 NW2d 910 (1981) 7

Mourad v Automobile Club Insurance Association, 186 Michigan App 715; 465 NW2d 395 (1991) 22

Rodgers v Davis, 410 Mich 144; 300 NW2d 910 (1981) 7,9

Sechler v Van Hoey, 83 Mich App 252; NW2d (1982) 12

Statutes

GCR 1963, 105.8 7

GCR 1963, 105 11

MCR 2.105 7

MCR 2.105(J)(1) 12

MCR 2.106 7

MCR 2.106(D) 11

42 US Code 1983 15

Miscellaneous

Restat. of Torts, Second Sec. 895 (D)(3)... 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN E. BRITT,

Petitioner,

v.

JERRY SMITH, JOSEPH WILSON, PAT BROWN, GENESEE COUNTY SHERIFF'S DEPARTMENT, GENESEE COUNTY,

Respondents.

PETITION FOR WRIT OF CERTIOTORI TO THE MICHIGAN SUPREME COURT

The petitioner, John E. Britt, respectfully prays that a writ of certiotari issue to review the denial of petitioner's delayed application for leave to appeal by the Michigan Supreme Court entered in the above entitled proceeding on

OPINIONS/ORDERS BELOW

The order of the Michigan Supreme Court sought to be review based on petitioner's delayed

application for leave to appeal is denied 8-29-94, and are reprinted in Appendix A hereto, p 1A, infra.

The per curiam opinion of the Michigan Court of Appeals dated February 11, 1994, No. 141603 [unpublished] is reprinted in Appendix B hereto, p 3A, infra.

The order of dismissal of the Michigan Circuit Court for the County of Genesee case no. 88-94768 NO, Judge Robert M. Ransom, dated March 15, 1991 is reprinted in Appendix C hereto, p 6A, infra.

The order of particial summary disposition of the Michigan Circuit Court for the County of Genesee, case no. 89-94768 NO, Judge Robert M. Ransom, dated February 26, 1991 is reprinted in Appendix D hereto, p 8A, infra.

JURISDICTION

The Michigan Supreme Court order denying petitioner's delayed application for leave to appeal was entered on August 29, 1994.

The jurisdiction of this Court to ecercise appellate judgement of a state court is provided

under the U.S. Const, Art 111, Sec 2; wherein the article and clause comprehends jurisdiction in all cases arising under the constitutional laws, and treaties of the United States; and 28 USCA 1257 provides for review of final judgements of highest state court involving validity of federal treaty or statute, or in cases where any claim to a title right or privilege under federal law, statue, commission, etc.

CONTUTIUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are: The 5th, 6th, 8th, and 14th amendments of the United States Constitution and 42 USC Sec. 1983. The above constitutional provisions and statutes are set forth in pertinent part in Appendix E, hereto, p 13A, infra.

STATEMENT OF THE CASE

Plaintiff, through counsel filed a civil rights action in Michigan Genesee County Circuit Court against the defendants, Jerry Smith, Pat Brown, Sheriff Joseph Wilson, Genesee County

and Genesee County Sheriff Department.

In the aforementioned civil rights action he alleged that Deputy Sheriff Jerry Smith and Defendant Brown assaulted and battered him on February 12, 1985 without cause using excessive and unreasonable force in an attempt to inflict cruel and unusual punishment while he was being held at the Genesee County Jail. The complaint alleged also that defendants ignored his repeated requests for medical treatment for injuries sustained in the beating. The Genesee Circuit Court subsequently granted summary judgment(s) in favor of all defendants in May 1991. Plaintiff then filed, through appellate counsel, an appeal of that determination to the Michigan Court of Appeals affirmation of the lower court's decision by leave to the Michigan Supreme Court. The Supreme Court denied the plaintiff's request for leave to appeal.

The plaintiff now seeks review by means of petition of certiorari in the United States Supreme Court of the lower court decision and subsequent affirmation and denial by the Michigan Court of Appeals and Michigan Supreme Court

respectively.

REASONS FOR GRANTING THE PETITION

I. Introduction

This petition presents a significant question as to whether a 1983 claimant suit can be dismissed against defendant Smith based on factual invalidity of substituted service, pursuant to GCR 1963, 105.8 [now MCR 2.106(D)], wherein the set aside of default and dismissal conflicts with both United States Supreme Court and State Court precedent regarding substituted service and notice. See e.g. Mullane v Central Hanover Bank and Trust, 339 US 306; 70 SCt 652; 94 LEd 865 (1950), Krueger v Williams, 410 Mich 144; 300 NW2d 910 (1981) and Rodgers v Davis, 410 Mich 144; 300 NW2d 910 (1981) [companion cases].

In this case, the petitioner had initially been granted a default judgement against defendant Smith. As a matter of fact, a default judgement as to liability had been entered against defendant Smith on March 8, 1989. At trial of March 15, 1991 some two years later, the trial court sua

sponte set aside the default and vacated the substituted service order. The rationale provided by the Court for such sua sponte action was that based on testimony offered at trial that such service could not be reasonable calculated to give defendant Mr. Smith notice and thereby dismissal of all claims against defendant Smith for lack of jurisdiction was proper.

Further, the petitioner's 1983 claims against the defendants, Joseph Wilson, Pat Brown, Genesee County Sheriff's Department and Genesee County were improperly dismissed based on summary disposition motions in spite of federal case authority and factual components dictating contrary determinations under the 8th Amendment and federal statute.

Lastly, the important question as to whether the Court is empowered to deny petitioner his opportunity to litigate his 1983 action by denying him the right to discharge his attorney or alternatively whether the petitioner's civil rights were violated because of the court's denial of attorney withdrawal.

The Michigan Court of Appeals in its opinion does not even address the due process issue relative to substituted service and notice. As to the attorney withdrawal issue, the Court of Appeals perceived no constitutional problem but chose to offer the remedy of malpractice. Finally, the Appeals Court's response to his 1983 claim was lack of documentary evidence.

II. THE DENIAL BY THE MICHIGAN SUPREME COURT OF PETITIONER'S APPLICATION FOR LEAVE TO APPEAL AFFIRMS THE LOWER COURT'S DECISION THAT IGNORES THE STATE AUTHORITY RECOGNIZING FEDERAL PRECEDENT AS TO SUBSTITUTED SERVICE AND NOTICE REQUIREMENTS.

A. The Dismissal Of Defendant Jerry Smith From Suit Was Contrary To Due Process and Notice and Notice Requirements Associated With Substituted Service

In Krueger v Williams and Rodgers v Davis, 410 Mich 144; 300 NW2d 910 (1981), companion cases, the central issue before the Supreme Court was whether former GCR 1963, 105.8 [now MCR 2.105(1)],[1] authorizes publication as a means of

[1]Under the current rule, MCR 2.106 prescribes the procedure for service of publication under MCR 2.105.

substituted service "reasonably calculated to give actual notice of the proceedings...."

Responding to the aforementioned question, the Court in Krueger, supra and Rodgers, supra relied on the notice requirement as set forth in Mullane v Central Hanover Bank and Trust, 339 US 306; 70 SCt 652; 94 LEd 865 (1950). The United States Supreme Court in Mullane recognized that the means of service implemented might never reach the defendant. Here, the language utilized in Mullane, supra was found to be pertinent, when the Court observed:

> [I]t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. Id 339 US 317; Krueger, 300 NW 2d at 915.

Further, the Court in Krueger, supra continued its discussion of the Mullane rationale by noting as follows:

> This language reflects an awareness that there may be situations in which an injured plaintiff will not be denied a cause of action even though defendant cannot be found.

* * * * * * * * * * * *

> When circumstances make it doubtful that actual notice will be effected, the method used may not be substantially less likely to afford notice than any other customary substitutes. Krueger, 300 NW2d at 918.

This statement by the Michigan Supreme Court was made as a result of the ruling in Mullane, supra, which was that while one must use a means of service reasonable calculated to give notice, "where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." 300 NW2d at 917-918, citing Mullane, 339 US 314-315, 70 SCt 657-658. It is implicit in the Krueger and Rodgers decisions is that publication is only insufficient when better means are available.

In this connection, the Court in Rodgers, supra remanded that case for the purpose of allowing plaintiffs to show that they did use due diligence to locate defendants, but were unable to serve them under other rules, and that no better means of service were available, 300 NW2d at 920.

Notably, the plaintiff in the instant case submitted an affidavit and motion for substituted service on October 8, 1988 indicating that the whereabouts of the defendant, Deputy Smith, were unknown and that due diligence was exercised in order to track him down. Plaintiff's motion stated as follows:

> The address for Defendant Jerry Smith was sent to the United States Post Master in both Memphis, Tennessee and Flint, Michigan to obtain a current address. The Plaintiff filed a FOIA request with Defendant Jerry Smith's probation department in an attempt to obtain Defendant's current address. Plaintiff has also hired Michigan Lawyers Services to locate the Defendant but their attempts have been unsuccessful. On July 7, 1988, this Court issued an Ex Parte Order granting Plaintiff additional time in which to serve Defendant Jerry Smith but despite the Plaintiff's best efforts he has been unable to effectuate service. (Brief in Support of Motion for Substituted Service, p. 3).

Plaintiff's private investigator tracked Defendant Smith to Tennessee, but lost track of him and was unable to locate him. Thereafter, the matter was heard by the Court and a valid Order for Substituted Service was entered on October 21, 1988 directing that the order be

posted in Genesee County Circuit Court for three weeks and in the Flint Journal. The order was fully complied with, as stated in the affidavit of Steven J. Halbert, Plaintiff's formal counsel, filed with the trial court on February 21, 1989 in support of his motion for Entry of Default Judgement.

As previously noted, the trial court some two years after the entry of default decided sua sponte during course of trial to nullify the Order of Substituted Service set aside the default and default judgement, and dismiss the case.

The Court of Appeals agreed with the plaintiff that the reason(s) given for such action by the trial were wrong; however, the Court of Appeals opinioned that the act of dismissing was right because the Order for Substituted Service did not meet the strict requirements of MCR 2.106(D).

Pointedly, the Court of Appeals in reaching its decision based on strict compliance to GCR 105, <u>failed to consider whether substituted service in the instant case satisfied due process</u>

as reasonable calculated to give defendant actual notice of proceedings. Sechler v Van Hoey, 83 Mich App 252; NW2d (1982). Accordingly, the decision of the United States Supreme Court in Mullane v Central Hanover Bank and Trust, supra determined that due process was satisfied in those unusual instances when substituted service was the only option reasonably calculated to give defendant actual notice of proceedings. Similarly, the new Michigan court rules, MCR 2.105(J)(1) in particular restates the due process principle recognized in Mullane, supra, as follows:

> "Provisions for service of process contained in these rules are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances. These rules are not intended to limit or expand the jurisdiction given the Michigan Courts over a defendant. The jurisdiction of a court over a defendant is governed by the United States Constitution and the constitution and laws of the State of Michigan.

Thus, it is unquestionable that the facts in the instant matter, prompting the Plaintiff's utilization of an alternative means of giving

notice - satisfies the due process requirements of Mullane, and previously cited state authority which followed the federal precedent. Hence, the dismissal of Jerry Smith from suit should have been foreclosed based on the aforementioned cited federal and state authority.

III. DEFENDANT JERRY SMITH'S ACT OF ASSAULT AND BATTERY UPON PLAINTIFF SHOULD HAVE PRECLUDED DEFENDANT'S DISMISSAL FROM SUIT BASED ON FEDERAL PRECEDENT UNDER 42 USC 1983.

Restatement of Torts, Second Sec. 895(D)(3) reflects the following comments regarding the scope of official authority:

> An immunity protects an officer only to the extent that he is acting in the general scope of his official authority. When he goes entirely beyond it and does an act that he is not permitted at all by that duty, he is not acting in his capacity as a public officer or employee and he has no more immunity than a private citizen.

The aforementioned is buttressed by the decision in Dilmore v Stubbs, 636 F2d 966, 968-7 (5th Cir. 1981), which expounded:

> An official is thus liable under Sec. 1983 "if he knew or reasonably should

> have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the persons affected.
>
> * * * * * * * * * * * *
>
> ..... he will not be shielded from liability if he acts with such disregard of the [plaintiffs] clearly established constitutional rights that his action cannot be characterized as being in good faith."

See e.g. Williams v Thomas, 511 F Supp 535, 543 (1981), where the Court found as a matter of law no "good faith" defense was available when the detention officer by means of assault and battery (slammed plaintiff against a wall, threw him to the floor, kicked and beat him). Such behavior opinioned the Williams v Thomas, supra Court clearly violates a prisoner's constitutional right to be free from such unjustified assaults.

Likewise, in the instant case, the complaint alleges that unjustified assault and battery upon the plaintiff by the defendant Jerry Smith (prison guard) was the result of defendant's belief that plaintiff was a "snitch" relative to his criminal conduct (selling drugs within the prison).

In any event, the conduct of defendant Jerry Smith should have precluded him from being dismissed from suit. Hence, the trial court's summary dismissal of defendant from suit is not sustainable under federal precedent.

IV. THE DEFENDANTS, GENESEE COUNTY SHERIFF JOSEPH WILSON, DEPUTY PAT BROWN, GENESEE COUNTY AND GENESEE COUNTY SHERIFF'S DEPARTMENT SHOULD NOT HAVE BEEN DISMISSED FROM PLAINTIFF'S 42 USC 1983 ACTION BY MEANS OF SUMMARY DISPOSITION MOTION UNDER THE EIGHTH AMENDMENT.

The central component of plaintiff's 1983 complaint was that he was denied/delayed medical attention after suffering numerous serious injuries from an assault upon him by one of the deputy sheriffs, namely, Jerry Smith. A prisoner's constitutional rights under the Eighth Amendment to the Constitution of the United States and Title 42, United States Code, Section 1983 are violated by prison officials or employees when they are deliberately indifferent to a prisoner's serious medical needs. Estelle v Gamble, 429 US 97; 97 Sct 285; 50 LEd 2d 251 (1976).

Defendant Genesee County Sheriff Joseph Wilson

A 1983 claimant may maintain a theory of direct liability against a prison or other official if that official fails to properly train, supervise, direct or control the actions of a subordinate who causes the injury. Crooks v Nix, 872 F2d 800, 804 (8th Cir. 1989), (citing Hahn v McLey, 737 F2d 771, 773 (8th Cir. 1984)). Abdication of policy-making and oversight responsibilities can reach the level of deliberate indifference and result in the unnecessary and wanton infliction of pain to prisoners when tacit authorization of subordinates misconduct causes constitutional injury. See e.g. Messimer v Lockhart, 702 F2d 729, 732 (8th Cir. 1983); Slakon v Porter, 737 F2d 368, 372 (4th Cir. 1984), cert denied 470 US 1035; 105 SCt 1413; 84 LEd 2d 796 (1985).

Based on the above rationale, the grant of defendant's summary disposition motion was improper where the plaintiff alleged in his complaint that Sheriff Wilson abdicated his oversight responsibilities when in spite of fact that deputy sheriff was aware or should have

been aware (if properly supervised and conscientious in his oversight responsibilities) that the deputy was engaged in criminal conduct (selling drugs in prison) and thereby was prone to assaultive conduct against those who would frustrate his criminal activities. A supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event, Williams v Smith, 781 F2d 319, 323 (2d Cir. 1986).

Furthermore, in spite of plaintiff's complaint of serious injuries suffered at the hands of assaulting deputy, the official in the person of Sheriff Wilson chose to exercise inattentiveness to plaintiff's urgent need for medical attention basing his delay or inaction on his subordinates, inclusive of medical staff. Deliberate indifference encompasses a doctor's decision to take an easier and less efficacious course of treatment. Rogers v Evans, 792 F2D 1052, 1058 (11th Cir. 1986); Williams v Vincent, 508 F2d 541, 544 (2d Cir. 1974). Even one isolated failure to treat without more, while ordinarily

not actionable, may in fact rise to the level of a constitutional violation if the surrounding circumstances suggest a degree of deliberateness, rather than inadvertence, in the failure to render meaningful treatment. Gill v Mooney, 824 F2d 192, 196 (2nd Cir. 1987). A significant delay in treatment may also constitute a violation under the Eight and Fourteenth Amendments. See e.g. Bass v Jackson, 790 F2d 260, 263 (2d Cir. 1986) (five to six hour delay can constitute violation); Archer v Dutcher, 733 F2d 1416 (2d Cir. 1984) (5-hour delay held to constitute violation).

Where, as here, there is a factual dispute garnered from plaintiff's pleadings as to whether the defendant (Sheriff Wilson) conduct constituted deliberate indifference to the plaintiff's serious medical needs, summary dismissal is unwarranted and unduly prejudicial. See Liscio v Warren, 901 F2d 274, 276 (2d Cir. 1990); Hathaway v Coughlin, 841 F2d 48 2d Cir. 1988 (to decide questions of deliberate indifference is to make an impossible factual finding in a summary dismissal stage).

Prison Guard Pat Brown

Based on plaintiff's complaint, the prison guard Pat Brown acted in such a manner as to intentionally deny or delay his access to medical care. Indifference may be "manifested by prison doctors in their response to the prisoner's needs or by prison guard in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle v Gamble, 429 US at 104-05.

Defendants County Sheriff Department and Genesee County

The United States Supreme Court in Dishaney v Winnebago County Department of Social Services, 489 US 189, 198; 109 Sct 998, 103 LEd 2d 249 (1989) sets forth the basic rationale for maintaining an action against the County Sheriff's Department and the County of Genesee, as follows:

> When a person is institutionalized - and wholly dependent on the State ... a duty to provide certain services and care does exist. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that is renders his unable to care for himself, and at the same time fails to provide for

> his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the States's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom on his own behalf. See Estelle v Gamble, supra. [429 U.S.] at 103 [97 SCt at 290]("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"). In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Under the above rationale, municipal entities must be held liable if the constitutional violation can be shown to have resulted from the enforcement of an official policy, custom, or decision of the involved municipal entity. Monell v Department of Social Services, 436 US 658; 98 SCt 2018; 56 LEd 2d 611 (1978) where plaintiff was totally dependent upon the defendants' medical

care system, the municipality had an affirmative, constitutionally mandated duty to provide a system designed to meet the reasonably foreseeable needs. Doe v New York City Department of Social Services, 649 F2d 134, 141 (2nd Cir. 1981) reaff'd 709 F2d 782 (1982), cert denied 464 US 864; 104 SCt 195; 78 LEd 2d 171 (1983). (Government official may be held liable under section 1983 for a "failure to do what is required as well as for the overt activity which is unlawful and harmful ... when individuals are placed in custody under the care of the government, their governmental custodians are sometimes charged with affirmative duties the non-feasance of which may violate the constitution").

In short, the plaintiff's complaint creates genuine issues of material fact "as to whether the injuries [he] suffered were the forseeable result of systemic and systematic inadequacies and whether such inadequacies are specifically traceable to municipal policies or customs, including deliberately indifferent training, supervision, staffing, and/or the acts, omissions or decisions of named individual defendants."

Brown v Coughlin, 758 F Supp 876, 884 (SD NY 1991). Obviously, the presence of genuine issues of material fact would preclude the imposition of summary judgement to the prejudice of plaintiff.

V. THE TRIAL COURT ERRED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHERE HIS DENIAL OF PLAINTIFF'S RIGHT TO SEEK WITHDRAWAL OF COUNSEL FRUSTRATED PLAINTIFF'S RIGHT TO LITIGATE HIS FEDERAL CLAIM

A Client has an absolute right to discharge his attorney. See Comments to MRPC 2.116 (formerly DR 2-110; See e.g. Mourad v Automobile Club Insurance Association, 186 Mich App 715; 465 NW2d 395 (1991). Prior to the lower court hearing of March 15, 1991, counsel for the plaintiff informed the Court that he could not try the case as plaintiff had requested that other counsel by substituted and that other counsel had been contacted (hearing 3-15-91, pp 2, 4, 5). Irrespective of the Court being advised by counsel that he had been fired by the plaintiff, the trial court refused to permit the withdrawal. Subsequent thereto, plaintiff's attorney took

the adversarial position rather than that of the advocate and thereby abdicated previous legal stances taken.

Arguably, under the due process clause and Fourteenth Amendment, it was fundamentally unfair to deny the withdrawal of plaintiff's attorney, and once the attorney abdicated his previous legal stances which was tantamount to frustrating the plaintiff's federal claims, it would indeed be unfair for the trial court to then dismiss sua sponta based on plaintiff's fired attorney's assertions that no legitimate claim existed.

Certainly, a due process redress under the unusual attorney-client withdrawal situation would necessitate an overlying rather than simply a malpractice recommendation.

CONCLUSION

This petition for certiorari should be granted.

Respectfully submitted,

Eddie D. Smith, P20645
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN E. BRITT,

Petitioner,

v.

JERRY SMITH, JOSEPH WILSON, PAT BROWN, GENESEE COUNTY SHERIFF'S DEPARTMENT, GENESEE COUNTY,

Respondents.

CERTIFICATE OF SERVICE

Eddie D. Smith certifies that on the 27th day of November, 1994, he served copies of Petition for Writ of Certiorari to the Michigan Supreme Court, upon counsel for Respondents, to:

Richard M. Barron, Genesee County Corporation Counsel

1101 Beach Sterrt, Room 317

Flint, Michigan 48502

by placing same in an envelope so addressed to him and depositing said envelope in a U.S. mail receptavle with first-class postage fully prepaid

thereon.

I declare that the above statements are true to the best of my information, knowledge and belief. MCR 2.114(A)(2)(b).

Eddie D. Smith

Eddie D. Smith

APPENDIX A

MICHIGAN SUPREME COURT

ORDER

ENTERED: AUGUST 29, 1994

99270

JOHN A. BRITT,

Plaintiff-Appellant,

v

JERRY SMITH, et al,

Defendants-Appellees.

SC: 99270
COA: 141603
LC: 88-94768 NO

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not pursuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at

the direction of the Court.

August 29, 1994

/s/ _____.
Corbin R. Davis
Clerk

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

JOHN E. BRITT,

Plaintiff-Appellant,

v

JERRY SMITH, JOSEPH WILSON,
GENESEE COUNTY SHERIFF'S DEPARTMENT,
GENESEE COUNTY and PAT BROWN

Defendants-Apellees.

February 11, 1994

No. 141603
LC No. 88-94768 NO

Before: Cavanagh, P.J., and Brennan and R.A. Benson,[1] JJ.

PER CURIAM.

Plaintiff appeals as of right from orders setting aside a default judgement against defendant Jerry Smith and dismissing plaintiff's claims against defendants Smith, Joseph Wilson, and Genesee County. We affirm.

---

[1]Circuit judge, sitting on the Court of Appeals by assignment

Plaintiff, John Britt, alleged that in February, 1985, while plaintiff was an inmate in the Genesee County jail, he was assaulted by defendant Jerry Smith, a deputy sheriff. Plaintiff further alleged that he was denied medical attention following the assault.

After filing this lawsuit in February, 1988, plaintiff was unable to locate defendant Smith, who, apparently, was last heard of in Memphis, Tennessee. The court granted plaintiff's motion for an ex parte order permitting plaintiff to serve Smith by publication pursuant to MCR 2.106(D). Smith did not respond. On March 8, 1989, the court granted plaintiff's motion for default judgement against Smith as to liability only.

In May, 1990, plaintiff's attorney moved to withdraw as counsel. The court denied the motion.

Between February and May, 1991, the court dismissed plaintiff's claims against all defendants, having set aside the default against defendant Smith because service was never obtained and substituted service was not reasonably

calculated to give notice to Smith. This appeal followed.

The issues on appeal relate to the setting aside of the default judgement, the denial of the motion to withdraw as counsel, and the granting of summary disposition with respect to plaintiff's 42 USC § 1983 claims of deliberate indifference to the serious medical needs of a prisoner and improper hiring, training and supervision of a prison guard.

I

We conclude that the default judgement against defendant Smith was properly set aside. The order for substituted service was facially invalid because it did not specify the contents of the notice of action, pursuant to MCR 2.106(C)(1). Therefore, the trial court did not abuse its discretion in setting aside the default judgement, albeit for the wrong reason. See Gavulic v Boyer, 195 Mich App 20, 24; 489 NW2d 124 (1992); Bonner v Chicago Title Ins Co, 194 Mich App 462, 472; 487 NW2d 807 (1992).

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN E. BRITT,

Plaintiff,

vs. Case No: 88-94768 NO

JERRY SMITH, JOSEPH WILSON, GENESEE COUNTY SHERIFF'S DEPARTMENT, GENESEE COUNTY, and PAT BROWN, jointly and severally,

Defendants.

_____/

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2242 S. Telegraph
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(313)335-9266

MICHAEL E. ROSATI P-34236
Attorney for Defendants
----------/

ORDER OF DISMISSAL

At a session of said Court held in the County of Genesee State of Michigan on _____

PRESENT: HONORABLE_____
CIRCUIT COURT JUDGE

On the 15th day of March, 1991, the Court

having taken the testimony of the Plaintiff, JOHN E. BRITT, as related to the allegations against the Defendant, JERRY SMITH, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the claim against the Defendant, JERRY SMITH, be dismissed and the default filed in this case be set aside for the reason that proper service was not made on the Defendant.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN E. BRITT,

Plaintiff,

vs.

JERRY SMITH, JOSEPH WILSON, GENESEE COUNTY SHERIFF'S DEPARTMENT, GENESEE COUNTY and PAT BROWN, Jointly and Severally,

Defendants.
_____/

BARRY F. KELLER (P15806)
Attorney for Plaintiff
2242 S. Telegraph Road
Bloomfield Hills, Michigan 48013
(313) 335-9266

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.
By: MICHAEL E. ROSATI (P-34236)
33900 Schoolcraft Road, Suite G-1
Livonia, Michigan 48150-1392
(313) 261-2400
Attorneys for Joseph Wilson, Genesee County Sheriff's Dept. & Genesee County
_____/

Case No. 88-94768 NO

HON. Robert M. Ransom

ORDER OF PARTIAL SUMMARY DISPOSITION

At a session of said Court held in the City of Flint, Counry of Genesee, State of Michigan on_____

PRESENT: HONORABLE_____
Circuit Court Judge

Defendants' Motion for Summary Disposition having come on for hearing before the Court, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Plaintiff's claims against the Defendants', Wilson and the Genesee County Sheriff are dismissed with prejudice.

As to the Defendant, Genesee County, the Court grants the Defendant's motion and dismisses all the Plaintiff's claims against the County except for the claim that the Plaintiff's civil rights were violated by deliberate indifference to a serious medical need, that claim sounding under 42 USC Section 1983. As to that remaining claim against the Defendant, Genesee County, the Court reserved its ruling and will permit the Plaintiff to file an Affidavit in opposition to the Defendant's motion, said Affidavit to be filed by February 20, 1991. Thereafter, Defendants will have until March 6, 1991 to respond to the Affidavit filed by the Plaintiff. The Court will then rule on the remaining claim against Genesee County after oral argument to be set by the court.

/s/_____.
Robert M. Ransom
P-19226
Circuit Court Judge
2-26-91

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

JOHN E. BRITT,

Plaintiff,

vs.

JERRY SMITH, JOSEPH WILSON, GENESEE COUNTY SHERIFF'S DEPARTMENT, GENESEE COUNTY and PAT BROWN, Jointly and Severally,

Defendants.
_____/

BARRY F. KELLER (P15806)
Attorney for Plaintiff
2242 S. Telegraph Road
Bloomfield Hills, Michigan 48013
(313) 335-9266

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.
By: MICHAEL E. ROSATI (P-34236)
33900 Schoolcraft Road, Suite G-1
Livonia, Michigan 48150-1392
(313) 261-2400
Attorneys for Joseph Wilson, Genesee County Sheriff's Dept. & Genesee County
_____/

Case No. 88-94768 NO

HON. Robert M. Ransom

ORDER OF PARTIAL SUMMARY DISPOSITION

At a session of said Court held in the City of Flint, Counry of Genesee, State of Michigan on_____

PRESENT: HONORABLE_____
Circuit Court Judge

On the 15th day of March, 1991, the Court having taken the testimony of the Plaintiff, JOHN E. BRITT, as related to the allegations against the defendant, PAT BROWN, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the claim against the Defendant, PAT BROWN, be dismissed for the reason that there were no factual allegations to support the claim as alleged.

/s/
Robert M. Ransom
P-19226
Circuit Court Judge

APPENDIX E

COSTITUTIONAL PROVISION AND STATUES INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall prive property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the tight to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1. All persons born or naturalized

in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC Sec. 1983

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.